RONALD RUS, #67369
rrus@rusmiliband.com
LEO J. PRESIADO, #166721
lpresiado@rusmiliband.com
RUS, MILIBAND & SMITH
A Professional Corporation
Seventh Floor
2211 Michelson Drive
Irvine, California 92612
Telephone: (949) 752-7100
Facsimile: (949) 252-1514

Attorneys for Defendants
THUNDERWOOD HOLDINGS, INC.,
BRIAN DUNNING, and BRIANDUNNING.COM

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY INC., Plaintiff, vs. DIGITAL POINT SOLUTIONS, INC.; SHAWN HOGAN; KESSLER's FLYING CIRCUS; THUNDERWOOD HOLDINGS, INC.; TODD DUNNING; DUNNING ENTERPRISES, INC.; BRIAN DUNNING; BRIANDUNNING.COM; and DOES 1-20, Defendants.	CASE NO. C 08-4052 **REPLY BY DEFENDANTS THUNDERWOOD HOLDINGS, INC., BRIAN DUNNING AND BRIANDUNNING.COM TO OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** DATE: December 12, 2008 TIME: 9:00 a.m. CTRM: 3 Hon. Jeremy Fogel presiding

Dockets.Justia.com

TABLE OF CONTENTS

1. EBAY HAS FAILED TO MEET ITS BURDEN OF PROOF THAT VENUE IS PROPER IN THE NORTHERN DISTRICT 1

2. THE VENUE SELECTION CLAUSE REQUIRES THAT THE CASE BE DISMISSED AND NOT TRANSFERRED 4

3. EBAY DOES NOT EFFECTIVELY REFUTE THAT IT HAS FAILED TO SUFFICIENTLY ALLEGE THAT DEFENDANTS ACCESSED EBAY'S COMPUTERS 5

4. EBAY DOES NOT EFFECTIVELY REFUTE THAT IT HAS FAILED TO SUFFICIENTLY ALLEGE DAMAGE OR LOSS UNDER THE CFAA 8

5. EBAY DOES NOT EFFECTIVELY REFUTE THAT IT HAS FAILED TO SUFFICIENTLY ALLEGE A RICO CLAIM 11

6. THE REMAINDER OF EBAY'S VENUE RELATED ARGUMENTS FAIL 13

7. CONCLUSION 15

TABLE OF AUTHORITIES

FEDERAL CASES

Al-Abood v. El-Sfiamari,
217 F.3d 225 (4th Cir. 2000) 13

American Soda, LLP v. U.S. Filter Wastewater Group, Inc.,
428 F.3d 921 (10th Cir. 2005) 4

Civic Center Motors Ltd v. Mason Street Import Cars, Ltd,
387 F. Supp. 2d, 378 (S.D. N.Y. 2005) 10

Creative Computing v. Getloaded.com LLC,
386 F.3d 930 (9th Cir. 2004) 9

Da Cruz v. Princess Cruise Lines, Inc.,
2000 WL 1585695 (N.D. Cal. 2000) 1, 14

Diaz v. Gates,
420 F.3d 897 (9th Cir. 2005) 11

EF Cultural Travel BV v. Explorica, Inc.,
274 F.3d 577 (1st Cir. 2001) 7

Flip Mortgage Corp. v. McElhone,
841 F.2d 531 (4th Cir. 1988) 13

Garelli Wong & Associates, Inc. v. Nichols,
551 F. Supp. 2d 704 (N.D. Ill 2008) 9, 10

Gulf Offshore Co. v. Mobile Oil Corp.,
453 U.S. 473 (1981) 4, 5

H&R Block Tax Services, Inc. v. Riviera-Alicea,
570 F. Supp. 255 (D.P.R. 2008) 5

Hope v. Otis Elevator Co.,
389 F. Supp. 2d 1235 (E.D. Cal. 2005) 1

Hugel v. The Corporation of Lloyd's,
999 F.2d 206 (7th Cir. 1993) 3

Hunter v. J. Craig Constr. Co.,
51 F.3d 275 1995 WL 141359 (7th Cir. Marc. 30, 1995) 12

Ikuna v. Yip,
912 F.2d 306 (9th Cir. 1990) 12

International Airport Centers, LLC v. Citrin,
440 F.3d 418, on subsequent appeal 455 F.3d 749 (7th Cir. 2006) 8

Lou v. Belzberg,
834 F.2d 730 (9th Cir. 1987) 5

M/S Breman v. Zapata Off-Shore Co.,
407 U.S. 1 (1972) 1

Manetti-Farrow, Inc. v. Gucci America, Inc.,
858 F.2d 509 (9th Cir. 1988) 1

Medallion Television Ent. v. SelecTV of California, Inc.,
833 F.2d 1360 (9th Cir. 1988) 12

Milk N' More Inc. v. Beavert,
963 F.2d 1342 (10th Cir. 1992) 4

Miller v. Glen & Helen Aircraft, Inc.,
777 F.2d 496 (9th Cir. 1985) 11

Myers v. Bennett Law Offices,
238 F.3d 1068 (9th Cir. 2000) 14

Nexans Wires S.A. v. Sark-USA, Inc., et al,
319 F. Supp. 2d, 468 (S.D. N.Y. 2004) 10

Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference,
113 F. Supp. 737 (E.D. Pa. 1953) 1

Pacific Aerospace & Electronics, Inc. v. Taylor,
295 F. Supp. 2d 1188 (E.D. Wash. 2003) 8, 9

Panavision International LP v. Toeppen,
945 F. Supp. 1296 (C.D. Cal. 1996) 14

Pesnell v. Arsenault,
543 F.3d 1038 (9th Cir. 2008) 11

Royce International Broadcasting Corp. v. Field,
2000 WL 236434, 4 (N.D. Cal. 2000) 12

Scott v. Boos,
215 F.3d 940 (9th Cir. 2000) 12

Shurgard's Storage Centers, Inc. v. Safeguard Self Storage, Inc.,
119 F. Supp. 2d, 1121 (W.D. Wash. 2000) 10

TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.,
915 F.2d 1351 (9th Cir. 1990) 3

Therapeutic Research Faculty v. NBTY, Inc.,
488 F. Supp. 2d 991 (E.D. Cal. 2007) 10, 11

Ticketmaster LLC v. RMG Technologies, Inc.,
507 F. Supp. 2d 1096 (C.D. Cal. 2007) 7

United States v. Sablan,
92 F.3d 865 (9th Cir. 1996) 8

ViChip Corp. v. Lee,
438 F. Supp. 2d 1087 (N.D. Cal. 2006) 8

Woodke v. Dahm,
70 F.3d 983 (8th Cir. 1985) 14

FEDERAL STATUTES

18 U.S.C. § 1030(e) 8

18 U.S.C. § 1030(g) 8

28 U.S.C. § 1391(b) 13

Defendants Brian Dunning, Thunderwood Holdings, Inc. and Briandunning.com (collectively, "Defendants") reply to the Consolidated Opposition to Motions to Dismiss First Amended Complaint filed by Plaintiff eBay, Inc. ("Plaintiff" and/or "eBay") as follows:

1. EBAY HAS FAILED TO MEET ITS BURDEN OF PROOF THAT VENUE IS PROPER IN THE NORTHERN DISTRICT

eBay does not dispute that forum selection clauses are ***presumed valid*** under federal law and enforcement will be ordered unless it clearly would be "unreasonable and unjust, or the clause was invalid for such reasons as fraud or over-reaching." *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 512 (9th Cir. 1988). Rather, eBay argues that the venue selection clause contained in the Publisher Service Agreement ("PSA") does not govern because "eBay is not a party to the PSA and has never agreed to be bound by its terms." (Opposition at 17:20-21). EBay's argument fails.

eBay has the burden of proving that venue is proper in this District. *Da Cruz v. Princess Cruise Lines, Inc.*, 2000 WL 1585695, fn. 2 (N.D. Cal. 2000) (Plaintiff bears burden of establishing that venue is proper in the forum in which the case is filed), *citing, Ariola v. King*, 505 F.Supp. 30, 31 (D.Az. 1980); *see also, Hope v. Otis Elevator Co.*, 389 F. Supp. 2d 1235, 1243 (E.D. Cal. 2005).[1] eBay does not (and cannot) meet its burden overcoming the presumed validity of the forum selection clause contained in the PSA. In the Complaint eBay admits that "eBay used the services of CJ, a subsidiary of ValueClick, Inc., in administering the Affiliate Marketing Program."(Complaint at ¶ 20). In addition, eBay admits that on its behalf "CJ was responsible for, among other things, recruiting affiliates, tracking affiliate traffic, monitoring compliance with affiliates, preventing and detecting fraudulent activity, and paying affiliates using funds remitted by eBay." (Complaint at ¶ 20). Moreover, every aspect of eBay's claims against Defendants arise from Defendants' participation in eBay's Affiliate Marketing Program. (Complaint at ¶¶ 19 to 32). Indeed, only because Defendants were "affiliates" in eBay's "Affiliate Marketing Program" pursuant to the PSA were Defendants able to receive monies from eBay for "Revenue Actions," which eBay alleges Defendants fraudulently manipulated. (Complaint at ¶ 19). Simply put, without Defendants' participation as an affiliate in eBay's Affiliate Marketing Program via the PSA, the claims alleged by eBay in the Complaint would not exist—***there would have been no basis for eBay to make the very payments to Defendants it now seeks to disgorge from Defendants by this Action***.

---

[1] The Court can consider facts and evidence outside the pleadings and need not accept the pleadings as true in consideration of a Rule 12(b)(3) motion. Ordinarily, the question of proper venue is resolved through submission of evidence by affidavit or declaration. See *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference,* 113 F. Supp. 737, 745 (E.D. Pa. 1953).

Despite having the burden of proof as to venue, eBay presents absolutely no evidence that CJ and Defendants did not enter into the PSA as alleged by CJ in CJ's complaint filed in state court. Presumably eBay would have such evidence at its fingertips if such evidence existed. Rather, eBay argues that "the KFC Defendants provide no basis for their contention that eBay ever 'required' them to enter into the PSA, as none of the Defendants claim that eBay demanded that they sign the 'T&C Supplement,' or that they ever signed the document." eBay attempts to turn the burden of proof on its head. eBay submits no evidence of the naked assertions it makes - ***more specifically, eBay presents no evidence that CJ and Defendants did not enter into the PSA, no evidence that Defendants were not required to enter into the PSA in order to operate as affiliates in eBay's Affiliate Marketing Program, no evidence that eBay's T&C Supplement does not incorporate and supplant the PSA by its terms (see Defendants' Exhibit "3"), no evidence that Defendants were not required to affirm and/or agree to the T&C Supplement, no evidence that Defendants did not affirm and/or agree to the T&C Supplement, and no evidence that CJ is not eBay's agent for the purposes of eBay's Affiliate Marketing Program.***[2] If such evidence exists there can be no question that

[2] Likewise eBay submits no evidence supporting its argument that "the User Agreements between eBay and the individual Defendants were violated and provide for venue in Northern California." Despite the fact that this statement makes no sense in light of the myriad allegations as to the Affiliate Marketing Program contained in the Complaint, eBay does not so much as attach the alleged "User Agreements" to its papers, much less explain how purported User Agreements (i.e., presumably agreements entered into by those who use eBay's services) have anything to do with its claims.

it would be in the hands of eBay. Yet eBay's Opposition is completely devoid of any evidence challenging the presumed validity of the subject forum selection clause.

It is important to note that eBay does not challenge the existence of the PSA, but rather that it is not a party to the PSA. Yet, eBay ignores well established Ninth Circuit law that ***a forum selection clause binds and can be enforced against non-signatories to the agreement "so closely related" that they "should benefit from or be subject to" the clause.*** *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F. 2d 1351, 1354 (9th Cir. 1990) (A forum selection clause restricts a third-party beneficiary to the designated forum). eBay admits in the Complaint that it benefits from the PSA and is, at the very least "closely related" to the PSA. Defendants are part of eBay's Affiliate Marketing Program *only* as a result of the PSA. As set forth above, every aspect of eBay's claims against Defendants arise from Defendants' participation in eBay's Affiliate Marketing Program. (Complaint at ¶¶ 19 to 32). Indeed, in the T&C Supplement eBay expressly refers to "[Defendants'] participation in the Affiliate Program ***maintained by eBay, Inc. through Commission Junction, Inc.***" and that the T&C Supplement supplements the PSA.[3] Indeed, it cannot be reasonably disputed that eBay was a third party beneficiary of the PSA if not a direct party to it on account of its agency relationship with CJ and/or the express terms of the T&C Supplement. Nevertheless, as set forth in *Hugel v. The Corporation of Lloyd's*, 999 F. 2d 206, 209-210 (7th Cir. 1993), third party beneficiary status need not be found before binding a third party to a forum selection clause although such a finding will suffice. The test is "closely related"and the forseeability of the enforcement of the clause on a third party. At the very least, eBay is closely related to the PSA - directly receiving the benefits of the Affiliate Marketing Program while obligated to pay commissions for "Revenue Actions."

/ / /

/ / /

---

[3] The T&C Supplement expressly provides that "[i]f any of these Terms and Conditions conflict with those of the PSA, then these Terms and Conditions will control." In addition, the T&C Supplement provides that the capitalized terms in the PSA and the T&C Supplement have the same meaning.

In sum, eBay has failed to, and cannot, meet its burden that venue is proper in the Northern District in light of the forum selection clause contained in the PSA and subsumed by the T&C Supplement.

2. THE VENUE SELECTION CLAUSE REQUIRES THAT THE CASE BE DISMISSED AND NOT TRANSFERRED

The wording of a forum selection clause may properly limit litigation to particular courts within a state: e.g., to state courts rather than federal district courts located in the state. *American Soda, LLP v. U.S. Filter Wastewater Group, Inc.*, 428 F. 3d 921, 926 (10th Cir. 2005) ("Courts of the State of Colorado" meant meant state courts not federal courts); *see also, Milk N' More Inc. v. Beavert*, 963 F. 2d 1342, 1345 (10th Cir. 1992). The forum selection clause at issue in this case limits litigation to state courts except to the extent "federal courts have exclusive jurisdiction." Paragraph 9(d) of the PSA provides as follows:

> This Agreement is governed by the laws of the State of California (USA), except for its conflict of law provisions. ***The exclusive forum for any actions related to this Agreement shall be in the state courts, and, to the extent that federal courts have exclusive jurisdiction, in Los Angeles, California. The parties consent to such venue and jurisdiction*** and waive any right to a trial by jury. (Emphasis added.)

Federal courts do not have exclusive jurisdiction over the federal claims alleged by eBay in the Complaint. As such, ***the claims alleged by eBay can only be brought in state court in Los Angeles***. There are some matters that are within the exclusive jurisdiction of the federal courts, but these are very few. Most claims, including most federal question claims, are subject o the concurrent jurisdiction of federal and state courts. *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 478 (1981). Indeed, in considering the propriety of state court jurisdiction over any federal claim, it is presumed that state courts enjoy concurrent jurisdiction. That presumption can only be rebutted by an explicit statutory directive confining

/ / /

jurisdiction to federal courts or by clear incompatibility between state court jurisdiction and federal interests. *Gulf Offshore*, *supra,* 453 U.S. at 478.

It is well settled that both federal law claims alleged by eBay in the Complaint are subject to the concurrent jurisdiction of the state and federal courts. First, the CFAA does not contain an explicit directive conferring exclusive jurisdiction and it has otherwise been held that no exclusive federal jurisdiction exists as to civil actions under the CFAA. *H&R Block Tax Services, Inc. v. Riviera-Alicea*, 570 F. Supp. 255, fn. 5 (D.P.R. 2008), *citing, Prominent Consulting LLC v. Allen Bros.*, 543 F. Supp. 2d 877, 884 (N. D. Ill. 2008). Likewise, civil RICO claims are not within the exclusive jurisdiction of the federal courts. The seminal Ninth Circuit case on the issue is *Lou v. Belzberg*, 834 F. 2d 730, 735 (9th Cir. 1987). The *Lou* court determined that although there are persuasive arguments both for and against concurrent jurisdiction, "the stronger arguments favor concurrent jurisdiction" as to civil RICO claims.

Therefore, the subject venue selection clause requires that the case be dismissed since it cannot be brought in the federal court of any District. To the extent eBay re-files the claims alleged in the Complaint against Defendants, such claims can only be brought in Superior Court located in Los Angeles.

3. EBAY DOES NOT EFFECTIVELY REFUTE THAT IT HAS FAILED TO SUFFICIENTLY ALLEGE THAT DEFENDANTS ACCESSED EBAY'S COMPUTERS

As set forth in the Motion, a violation under subsection (a)(4) of the CFAA involves someone who "knowingly and with intent to defraud, ***accesses a protected computer*** without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period." (Emphasis added.) According to eBay's Complaint, the "cookie stuffing" scheme alleged involved the alleged placing of "cookies" by Defendants on internet users' computers, not on eBay's computers. (Complaint at ¶¶ 21-28, 34 and 38 as set forth above.) More specifically, eBay alleges that "cookies" are "stored in the user's web browser"

(Complaint at ¶ 21), and that "cookie stuffing" is a term to describe the forced placement of a cookie on a computer, typically by causing a cookie from a particular website to be placed ***on the user's computer***. . . ." (Complaint at ¶ 24.) eBay alleges that "the cookie was stuffed ***on the user's computer*** by one or more Defendants. . . ." (Complaint at ¶ 27), and that "[Defendants] used technology that would stuff cookies on only ***those computers*** that had not previously been stuffed." (Complaint at ¶ 28.)

In its Opposition eBay does not dispute that Defendants did not access its computers. Rather eBay argues that Defendants ***caused*** unauthorized access to eBay's computers "***through their agents***"- the "***unsuspecting web users.***" (Opposition at 4:28 and 5:25-26). In other words, eBay argues that "unsuspecting web users" acted as agents for Defendants by somehow accessing eBay's computers. However, this contention is belied by eBay's description of the mechanics of the alleged "cookie stuffing scheme." More specifically, eBay alleges that the "cookie stuffing scheme" involved a three step process: (1) Defendants drop a cookie on a web user's browser when the web user visits Defendants' website (Complaint at ¶¶ 21 and 24), (2) the web user subsequently visits (or is directed to) eBay's website and buys something (a "Revenue Action") (Complaint at ¶¶ 22, 24 and 25), and (3) while the user is at eBay's site "***eBay's site drops a cookie on the user's computer***" for the purpose of tracking which affiliate referred the user to eBay(Complaint at ¶ 22). As such, according to eBay's own allegations, ***Ebay accessed the web user's computer***, not the other way around.[4]

Notwithstanding the alleged mechanics of the purported "cookie stuffing scheme," eBay's argument that Defendants ***caused*** unauthorized access to eBay's computers

---

[4] Moreover, eBay's allegations reveal that it may not have been eBay that dropped the tracking cookie on the web user's browser but rather CJ, *i.e.*, "Ebay ***and/or Commission Junction, Inc. ("CJ")*** tracks this information using information placed in the new user's browser." (Complaint at ¶ 19, 5:1-3, emphasis added). This allegation has two important implications. First, any access alleged by eBay was to CJ's computers and not eBay's computers. Second, eBay cannot deny that CJ is its agent to the extent it brings its CFAA claim based on access to CJ's computers. This being the case, there can be no question the PSA applies and that the case can only be heard in state court in Los Angeles. See, sections 1 and 2 above.

"through their agents"- the "unsuspecting web users," fails on substantive grounds. eBay cites only two cases for the proposition that the phrase "access a protected computer" set forth at subsection (a)(4) of the CFAA can mean access not by the defendant, but by an "unsuspecting agent" of the defendant. Neither of the cases cited by eBay support this unfounded position.

First, *EF Cultural Travel BV v. Explorica, Inc.*, 274 F. 3d 577, 579 (1st Cir. 2001) does not support eBay's argument. In *EF Cultural* the defendant was a competitor of the plaintiff that hired a third party to develop a computer program to infiltrate the plaintiff's computers for the purpose of gathering proprietary information. As such, the relationship between the defendant and the third party was a knowing agency relationship originated for the purpose (known to both principal and agent) of infiltrating the plaintiff's computer system. eBay concedes that this is not the case here. eBay concedes that the web users had no idea of the use to which their computers were allegedly being put. (Opposition at 5:25-26). Moreover, as explained above, eBay concedes that it accessed web users' computers as opposed the web users accessing their computers. The link is not complete. The *EF Cultural* case is not on point and certainly does not stand for the proposition that unsuspecting web users can serve as agents for the purpose of "access" under the CFAA.

Ticketmaster LLC v. RMG Technologies, Inc., 507 F. Supp. 2d 1096, 1102-1103 (C.D. Cal. 2007) is likewise inapposite. Again, the third party doing the accessing in *Ticketmasters* was not without knowledge of the alleged access. Indeed, the third party accessors knew that the very purpose of the software sold to them by the defendant was to access and manipulate the plaintiff's computer system. Like the *EF Cultural* case, *Ticketmasters* is not on point and certainly does not stand for the proposition that unsuspecting web users can serve as agents for the purpose of "access" under the CFAA.

eBay does not dispute the authority cited by Defendants in the Motion that the cases where the CFAA has been held to apply generally apply the standard, everyday meaning of accessing a computer. For example, a substantial number of cases involving application of the CFAA involve an employee of the plaintiff accessing by physically logging-on the computers of the plaintiff to obtain or delete information on the employer's computer system.

E.g., *United States v. Sablan*, 92 F.3d 865 (9th Cir. 1996); *ViChip Corp. v. Lee*, 438 F.Supp.2d 1087 (N.D. Cal. 2006); *International Airport Centers, LLC v. Citrin*, 440 F.3d 418, on subsequent appeal 455 F.3d 749 (7th Cir. 2006); *Pacific Aerospace & Electronics, Inc. v. Taylor*, 295 F.Supp.2d 1188 (E.D. Wash. 2003). As far as Defendants' research has revealed, no case law exists where a scheme such as that alleged by eBay has been deemed an "accessing" of computers within the contemplation of the CFAA.

Therefore, based on eBay's allegations, eBay has not (and cannot) allege that Defendants accessed its computers as required to state a claim under the CFAA.

4. EBAY DOES NOT EFFECTIVELY REFUTE THAT IT HAS FAILED TO SUFFICIENTLY ALLEGE DAMAGE OR LOSS UNDER THE CFAA

In order to state a cause of action under the CFAA, a plaintiff must allege "damage" or "loss," as those terms are defined under the CFAA. 18 U.S.C. § 1030(g). "Damage" is defined as "impairment to the integrity or availability of data, a program, a system or information." 18 U.S.C. § 1030(e)(8). Loss is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. § 1030(e)(11). eBay does not effectively refute that it has failed to sufficiently allege damage or loss under the CFAA.

In the Complaint, eBay relies on its allegations of improper payment of commissions to KFC to satisfy the pleading requirement of "loss," but the Complaint lacks allegations to meet the statutory requirement of "damage" even if, assuming *arguendo*, the allegations of overpayment of commissions meet the requirement for pleading a "loss." The Complaint does not contain allegations describing "any impairment to the integrity or availability" of anything related to eBay's computer system. In fact, the Complaint does not even attempt to allege "damage." Rather, the Complaint contains only vague allegations of "harm" as a result of Defendants' alleged conduct. (Complaint, ¶¶ 37 and 38, 9:17 and 24).

/ / /

eBay attempts to excuse its failure to plead "damage" by arguing that "no authority requires eBay to plead damage with particularity." (Opposition at 7:3-4). The question is not whether "particularity" in pleading damage under the CFAA is required; the Complaint lacks any pleading whatsoever regarding the statutorily required element of "damage." All elements of a claim for relief must be pleaded, and here the Complaint lacks any allegations to meet the requirement of "damage" as defined in CFAA to state a claim under Section (5)(A)(i).

The court in *Creative Computing v. Getloaded.com LLC*, 386 F.3d 930 (9th Cir. 2004) analyzed the meaning of "damage" under CFAA along with other issues. In *Creative Computing* "damage" as defined by CFAA occurred because of impairment to the integrity of the plaintiff's computer system caused by hacking, an examination of the plaintiff's valuable source code, and piercing a security gap in its software system. Clearly, such conduct raises the inference that the integrity of a computer's database has been impaired as required by CFAA. The Complaint contains no allegations that provide a similar inference of an impairment of the integrity of eBay's computer or database.

eBay also tries to circumvent its pleading requirement by citing *Pacific Aerospace & Electronics, Inc. v. Taylor*, 295 F. Supp. 2d 1188 (E.D. Wash. 2003) to suggest that pleading "damage" under CFAA can be done so easily because of the low monetary threshold. However, even *Pacific Aerospace* does not suggest that pleading the damage element of a CFAA claim can be completely ignored as eBay has done in the Complaint. Moreover, in *Garelli Wong & Associates, Inc. v. Nichols*, 551 F. Supp. 2d 704 (N.D. Ill 2008) the Court said that the *Pacific Aerospace* case "does not take into account that a civil violation of CFAA requires 'impairment to the integrity or availability of data, a program, a system or information' and 'interruption and service.'"

In *Garelli Wong* there was alleged misuse of confidential and proprietary information by the defendant, the Court nevertheless held that "integrity" as used in CFAA means impairment of the "completeness, usability or availability of data" on the plaintiff's computer. *Id.* at 709. The Court dismissed plaintiff's complaint under CFAA for failing to "sufficiently plead damage under the CFAA." *Id* at 710. The *Garelli Wong* case also questioned the continuing reliability of *Shurgard's Storage Centers, Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d, 1121 (W.D. Wash. 2000), on which eBay relies, by pointing out "that the CFAA was amended after the decision" and "is no longer compelling in light of the statutory amendments and other cases decided post-amendment." *Garelli Wong, supra* at 710.

Two other important cases out of the Southern District of New York considered the question of the pleading requirements for "damage" and "loss" under CFAA in response to a motion to dismiss. The cases are *Nexans Wires S.A. v. Sark-USA, Inc., et al*, 319 F. Supp. 2d, 468 (S.D. N.Y. 2004) and *Civic Center Motors Ltd v. Mason Street Import Cars, Ltd*, 387 F. Supp. 2d, 378 (S.D. N.Y. 2005). In *Nexans*, on a motion to dismiss the Court observed that plaintiff's complaint "simply tracks the language of the statute." *Id.* at 472. The Court issued an order "directing plaintiffs to submit the facts upon which the alleged loss is based" thus converting the motion to dismiss into a summary judgment motion. The evidence offered by the plaintiff was not sufficient to satisfy the "loss" requirement of CFAA because it was "unrelated to interruption of computer service" resulting in summary judgment in favor of defendants. *Id* at 478. Similarly, the *Civic Center Motors* case said that CFAA requires "damage to, or the inoperability of, the accessed computer system" and "costs not related to computer impairment or computer damages are not compensable under the CFAA." *Id.* at 381 & 382.

Finally, eBay attempts to argue that *Therapeutic Research Faculty v. NBTY, Inc.* 488 F. Supp. 2d 991 (E.D. Cal. 2007) provides guidance for this Court to resolve the issue of pleading "damage" under the CFAA. However, *Therapeutic Research* does not provide the support that eBay suggests. *Therapeutic Research* involved a limited access license to plaintiff's database purchased by one person for personal use being improperly used as a site license for multiple users to access the database and which would have cost defendant much more money. The defendant's actions revealed a weakness in the plaintiff's security and

/ / /

software system resulting in a "disclosure of its information" that impaired the integrity of the plaintiff's database. *Id.* at 996.

eBay's complaint does not raise similar issues. In eBay's complaint, the issue is not "impairment" of a computer or database; the issue is the interpretation of data provided by the "cookies" on the internet users' computer when they visit eBay's website. In the words of the Complaint at ¶ 25, the internet user is allegedly directed "to the eBay website without the user actually clicking on an eBay advertisement link" created by defendant. Complaint, ¶ 25, 6:20-21. Then, when the internet user "later visited eBay intentionally, and not as a result of any advertisement placed by Defendants," eBay's computer interpreted that a commission was due Defendants. Complaint, ¶ 27, 7:6-9. eBay claims that this data incorrectly generated a commission for the Defendants, whereas Defendants claim the information accurately entitled them to a commission. This is a contractual dispute over the interpretation of the data from "cookies" and does not come within the scope of CFAA as a question of impairment to the integrity or availability of data on eBay's computer.

For these reasons, the motion to dismiss the claim under CFAA must be dismissed because eBay has failed to allege that Defendants improperly accessed eBay's computers or that Defendants caused damage to eBay as defined in CFAA.

5. EBAY DOES NOT EFFECTIVELY REFUTE THAT IT HAS FAILED TO SUFFICIENTLY ALLEGE A RICO CLAIM

eBay does not dispute that the its RICO claim is based on a single alleged scheme against a single alleged victim arising from a contractual relationship between the parties. Rather, eBay argues, contrary to the cases cited by Defendants, that there is no prohibition against RICO claims that involve only a single victim and a single scheme. In support of this argument eBay sets forth a string of case citations without analysis. eBay does not analyze, or otherwise explain the application of the cases cited ***because the cases simply are not instructive on the issue***.

More specifically, three of the cases cited by eBay, namely *Pesnell v. Arsenault*, 543 F. 3d 1038 (9th Cir. 2008), *Diaz v. Gates*, 420 F. 3d 897 (9th Cir. 2005) and *Miller v. Glen*

& Helen Aircraft, Inc., 777 F. 2d 496 (9th Cir. 1985), do not involve a pre-existing contractual relationship between the parties and contain absolutely no discussion of the one victim/ one scheme issue. The simple fact that cases exist which seem to involve a RICO claim involving one victim and one claim does not support the argument that such claims withstand challenge on the one victim one claim issue. The cases provide no guidance whatsoever on the issue. The remaining cases cited by eBay, namely *Scott v. Boos*, 215 F. 3d 940 (9th Cir. 2000) and *Ikuna v. Yip*, 912 F. 2d 306 (9th Cir. 1990), are likewise inapplicable. Although the cases involve pre-existing business relationships, the cases contain absolutely no discussion of the one victim/ one scheme issue.

In the Motion Defendants cite several cases which provide that allegations of a single scheme perpetrated on a single victim and arising from a contractual relationship do not constitute the "pattern" of racketeering activity that is a prerequisite to a civil cause of action under the Act. It is well grounded that the purpose of the pattern requirement is "***to weed out garden variety fraud allegations and to prevent RICO from being misused as a tool wherewith a disgruntled party may exact disproportionate vengeance against his partners or associates when their business dealings turn sour.***" *Hunter v. J. Craig Constr. Co.*, 51 F3d 275 (Table), 1995 WL 141359, at 1 (7th Cir. Marc. 30, 1995); see also *Medallion Television Ent. v. SelecTV of California, Inc.*, 833 F.2d 1360, 1363-1364 (9th Cir. 1988) (RICO claim dismissed—"***this case involved but a single alleged fraud with a single victim.***"); *Royce International Broadcasting Corp. v. Field*, 2000 WL 236434, 4 (N.D. Cal. 2000) ("RICO was not intended to provide Federal remedy to 'every common law cause of action available to remedy business deals gone sour.'")

In response to these cases which are directly on point eBay attempts to draw a distinction between the "limited schemes" involved in the cases cited by Defendants and the "numerous acts of wire fraud" purportedly underlying its RICO claim. This is a distinction without a difference considering it does not undo the fact already conceded by eBay that its RICO claim is bases on one alleged scheme on one alleged victim arising from a pre-existing contractual arrangement.

Moreover, eBay does not even address the two most powerful cases cited by Defendants for the proposition that a single victim, single scheme, contract based claim is not viable under RICO. Indeed, a single alleged scheme, even if alleged to have taken place over years, directed against a single victim, simply cannot constitute a "pattern" of racketeering activity for RICO purposes. See, e.g., *Al-Abood v. El-Sfiamari*, 217 F.3d 225, 238 (4th Cir. 2000) (series of events against single victim, alleged to inflict injury over a period of years, does not constitute a pattern within the meaning of RICO); *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988) (same; to find otherwise would transform every business dispute into a cause of action under RICO). These cases go uncontested by eBay.

As set forth in the Motion, and supported by the case law cited, would-be RICO plaintiffs cannot recast ordinary commercial disputes as racketeering activity, even were alleged fraud is involved. eBay is a prime example of a would-be RICO plaintiff who is trying to manufacture a RICO complaint out of nothing. Even the most generous reading of the Complaint results in the realization that eBay's RICO claim is not warranted. eBay does not, and cannot, state a claim under RICO against Defendants. eBay's RICO claim must be dismissed.

6. THE REMAINDER OF EBAY'S VENUE RELATED ARGUMENTS FAIL

As set forth above, the forum selection clause in the PSA governs the claims alleged by eBay and restricts venue to the state court in Los Angeles. Notwithstanding, venue is not proper in the Northern District. Pursuant to 28 U.S.C. § 1391(b) venue in federal question cases is proper in the following judicial districts and no others: (1) if all defendants reside in the same state, a district were any defendant resides, or (2) a district in which a substantial part of the events on which the claim is based occurred, or (3) if there is no district were the action can otherwise be brought, the district in which any defendant may be found. eBay's argument that a substantial part of the events on which the claim is based occurred in the Northern District is not well taken.

It cannot be reasonably disputed that the alleged events upon which the action is based could only have occurred where the named defendants reside or are located, i.e., the

Central and Southern Districts. In protecting defendants from being haled into court in a remote forum, Congress' reference to "events or omissions giving rise to the claim" requires court's to focus on the relevant activities of the defendant, not the plaintiff. *Woodke v. Dahm*, 70 F. 3d 983, 985 (8th Cir. 1985). ***eBay disputes neither the application nor the substance of the Woodke case in this regard.*** In the Complaint eBay alleges that Defendants' alleged cookie stuffing scheme was "accomplished through software programs or code." (Complaint at § 25). It is axiomatic that the development of any such software or code was done at the Defendant's locations in the Central and Southern Districts. Again, having selected the forum, it is eBay's burden to prove otherwise. *Da Cruz , supra*, 2000 WL 1585695, fn. 2 (N.D. Cal. 2000), *citing, Airola, supra*, 505 F. Supp. at 31. Moreover, eBay alleges that CJ, as its agent administered the Affiliate Marketing Program on behalf of eBay, monitored traffic, monitored compliance by affiliates, paid affiliates and prevented and detected fraudulent activity. (Complaint at § 20). eBay alleges that CJ's headquarters are located in Santa Barbara which is located in the Central District. (Complaint at § 28).

In addition, eBay's reliance on *Panavision International LP v. Toeppen*, 945 F. Supp. 1296 (C.D. Cal. 1996) and *Myers v. Bennett Law Offices*, 238 F. 3d 1068 (9th Cir. 2000) is misplaced. First, the *Panavision* case has absolutely no discussion of the venue issue. Rather the case involved the propriety of granting summary judgment on issues of trademark law. The only reference to venue is in the introduction paragraph of the opinion were the court concludes in the final sentence (without any discussion or analysis) that "venue is proper under 28 U.S.C. 1391(b)(2) because a substantial part of the events giving rise to this litigation occurred in California." This hardly supports eBay's position and does nothing to counter the plain language of § 1391(b)(2) (i.e., "substantial part") nor the *Woodke* holding. Likewise, *Myers* is of no aid to eBay. The *Myers* court's discussion of the venue issue in that case is scant. In the very last substantive paragraph of the opinion, almost as an afterthought, the court in conclusory fashion states that "at least one of the harms suffered by Plaintiffs...was felt in Nevada. Accordingly, a substantial part of the events giving rise to the claim occurred in Nevada." However, the *Myers* court does nothing to explain the inherit contradiction of this statement. How is it that a single harm constitutes "a substantial part of the events giving rise to the litigation?" Moreover, following the *Myers* court logic, the District in which the plaintiff resides will always be the proper venue since a plaintiff will always allege to have suffered harm. Section 1391(b)(2) does not provide that venue is proper where the Plaintiff suffered harm, it states that venue is proper where a substantial part of the events on which the claim is based occurred. The blip in *Myers* relied upon by eBay does not overcome the plain language of the statute.

Finally, eBay fails to meet its burden with respect to the alleged residence of the corporate Defendants. Once again, eBay argues conclusions and fails to submit any evidence of its factual assertions as to the corporate Defendants' alleged contacts with the Northern District. As set forth above the burden is on eBay to factually establish the propriety of its choice of venue and, in the context of a Rule 12(b)(3) motion, the court looks beyond the pleadings and the matter is resolved by the submission of evidence by the party bearing the burden of proof. eBay utterly fails in this regard.

Therefore, venue is not proper in the Northern District and the action should be dismissed.

7. CONCLUSION

For each of the foregoing reasons, Defendants respectfully request that the Court dismiss the Complaint with prejudice.

DATED: November 26, 2008

Respectfully submitted,

RUS, MILIBAND & SMITH
A Professional Corporation

By: ______________________
LEO J. PRESIADO
Attorneys for Defendants
Thunderwood Holdings, Inc., Brian Dunning and BrianDunning.com

PROOF OF SERVICE

eBay, Inc. v. Digital Point Solutions, Inc., et al.
Northern District of California, San Jose Division
Case No. C 08-4052

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2211 Michelson Drive, Seventh Floor, Irvine, California 92612.

On **November 26, 2008**, I served the foregoing documents described as **REPLY BY DEFENDANTS THUNDERWOOD HOLDINGS, INC., BRIAN DUNNING AND BRIANDUNNING.COM TO OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** on the interested parties in this action by placing a copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

✓ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

___ (By E-Mail) As follows: I caused the above-referenced document(s) to be transmitted to the above-named persons.

___ (By Facsimile) As follows: I caused the above-referenced document(s) to be transmitted to the above-named persons by facsimile.

___ (By Hand Delivery) As follows: I caused the above-referenced document(s) to be hand delivered to the above-named persons.

___ (By Overnight Delivery) As follows: By overnight delivery via Overnite Express and/or Federal Express to the office of the addressee noted on the attached service list.

Executed on **November 26, 2008**, at Irvine, California.

✓ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

[signature]
RHONDA RADFORD

SERVICE LIST
eBay, Inc. v. Digital Point Solutions, Inc., et al.
Northern District of California, San Jose Division
Case No. C 08-4052

David R. Eberhart
Sharon M. Bunzel
Colleen M. Kennedy
O'Melveny & Myers
Two Embarcadero, 20th Floor
San Francisco, CA 94111
Tel: (949) 984-8700
Fax: (949) 984-8701
Attorneys for Plaintiff eBay, Inc.

Stewart H. Foreman
Freeland, Cooper & Foreman, LLP
150 Spear Street, Suite 1800
San Francisco, CA 94105
Tel: (949) 541-0200
Fax: (949) 495-4332
Attorneys for Defendants Todd Dunning and Dunning Enterprises, Inc.

Seyamack Kouretchian
Coast Law Group. LLP
169 Saxony Road
Suite 204
Encinitas, CA 92024
Tel: (760) 942-8505
Fax: (760) 942-8515
Attorneys for Digital Point Solutions, Inc. and Shawn Hogan